IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Supreme Court, U. S.
FILED
JAN 31 1980
MICHAEL RODAK, JR., CLERK

NO. 79-5904

PAUL ROLAND HAMILTON,

Petitioner,

v.

78-6199

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF GEORGIA

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STATE OF GEORGIA,

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BRIEF IN OPPOSITION FOR THE RESPONDENT

QUESTION PRESENTED

WHETHER THIS COURT SHOULD CONSIDER THE CONSTITUTIONALITY OF GA. CODE ANN. § 27-2534.1(b)(7) WHEN THE FEDERAL QUESTION WAS NOT PRESENTED TO THE STATE COURTS FOR CONSIDERATION.

STATEMENT OF THE CASE

Petitioner, Paul Roland Hamilton, was indicted in Chatham County, Georgia, during the June Term of 1977 for the murder of John A. Shinall. (R. 3, 4). Petitioner was found guilty pursuant to a jury trial and on August 4, 1978, was sentenced to death. (R. 9).

The jury found that the death penalty should be imposed based on the existence of two statutory aggravating circumstances. The jury found that "the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. . ." and "the offense of murder was committed while the offender was engaged in the commission of another capital felony . . ." (R. 8) Ga. Code § 27-2534.1(b)(2) and (7).

Petitioner's motion for a new trial was denied and a notice of appeal was filed to the Georgia Supreme Court. On direct appeal, the Georgia Supreme Court affirmed the conviction and the death sentence. Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979). A detailed factual narrative can be found in the opinion of the Georgia Supreme Court.

Petitioner now seeks to have this Court review the decision of the Georgia Supreme Court by way of a petition for a writ of certiorari.

REASON FOR NOT GRANTING THE WRIT

I.

THIS COURT SHOULD REFUSE TO CONSIDER THE ISSUE RAISED BY THE PRESENT PETITION AS THERE IS NO FEDERAL QUESTION RAISED WHICH WAS PROPERLY PRESENTED TO THE STATE COURTS FOR A DECISION.

The Petitioner attempts to attack the constitutionality of Ga. Code Ann. § 27-2534.1(b)(7) for the first time in a petition for certiorari in this Court. Petitioner admits that the issue was not directly raised in the state courts and was not decided by the Supreme Court of Georgia. (Petitioner at 7). Petitioner now seeks to assert that the Georgia statute setting out one of the aggravating circumstances that would support the imposition of the death penalty presents a vague and subjective standard and is unconstitutional as applied to the Petitioner.

This Court has held on numerous occasions that it will not decide federal constitutional issues raised for the first time in this Court on review of a state court decision. Cardinale v. Louisiana, 394 U.S. 437 (1969). In the present case, the Petitioner has attempted to raise as his sole federal question, one that was never raised, preserved or passed upon in the state court. This Court has noted that in a federal system "it is important that state courts be given the first opportunity to consider the application of state statutes in light of constitutional challenges." Cardinale at 439. Thus, Respondent submits that this Court should refuse to review this issue as the Georgia state courts have not had an opportunity to pass on the federal question raised.

Petitioner asserts that even though the challenge was not directly raised, the Georgia Supreme Court impliedly considered the issue in its review of the sentence imposed in this case. Under Ga. Code Ann. § 27-2537, the Georgia Supreme Court automatically reviews any death sentence imposed. In the case at bar, the Georgia Supreme Court considered the sentence and found "that the evidence supports the jury's findings that this murder was vile, horrible or inhuman in that it involved an aggravated battery to the victim and that the offense of murder was committed while the offender was engaged in the commission of another capital felony." Hamilton, 244 Ga. at 150. The Court did not consider the constitutionality of the application of the statute, but merely found that there was sufficient evidence to support the jury's finding of the statutory aggravating circumstances. This is not sufficient to find that the Court considered the federal question raised in this case.

Even if this Court should not find a procedural bar to the present petition, this Court should decline to consider the issue on substantive grounds. This Court has previously considered the entire statutory scheme for implementing and reviewing the death penalty in Georgia. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court looked at the Georgia sentencing system as a whole. This Court noted that the Petitioner in Gregg had attacked the seventh aggravating circumstance, as does the Petitioner in the present case, and the Court found that there is no reason to assume the Georgia Supreme Court would use an open ended construction of the statute. Gregg, supra at 200-201. This Court held that the statutory system in Georgia did not violate the Constitution of the United States.

Petitioner further asserts that this Court should consider this case because this Court has granted certiorari in Godfrey v. Georgia, 48 U.S.L.W. 3241 (Oct. 9, 1979). In Godfrey, this Court granted certiorari to consider the following question:

> "In affirming the imposition of the death sentence in this case, has the Georgia Supreme Court adopted such a broad and vague construction of Ga. Code Ann. § 27-2534(b)(7) as to violate the eighth and fourteenth amendments?"

Godfrey, supra (Emphasis added). Thus, this Court has granted certiorari in Godfrey to consider the application of the statute to the facts in that case. There is no implication that the statute is unconstitutional on its face or as applied in all cases.

Furthermore, this case is distinguishable from the case in Godfrey. In Godfrey, the jury sentenced the defendant to the death penalty based only on the seventh statutory aggravating circumstance. Godfrey v. State, 243 Ga. 302, 310, 253 S.E.2d 17 (1979); Ga. Code Ann. § 27-2534.1(b)(7). In the case at bar, the jury found not only that "the offense of murder was vile, horrible or inhuman in that it involved an aggravated battery to the victim. . ." but also found the second aggravating circumstance, that is, that "the offense of murder was committed while the offender was engaged in the commission of another capital felony." Hamilton, 244 Ga. at 150; Ga. Code Ann. § 27-2534.1(b)(2). Thus, even were this Court to find a constitutional deficiency in the seventh aggravating circumstance, there would still be sufficient evidence to uphold the death sentence based on the jury's finding of the second aggravating circumstance. Respondent

asserts that even if the federal question had been properly presented to the state court, there is no reason for this Court to consider the application of the code section to the case at bar as it would not serve to vacate the death sentence.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court to deny the petition for a writ of certiorari filed on behalf of Paul Roland Hamilton.

Respectfully submitted,

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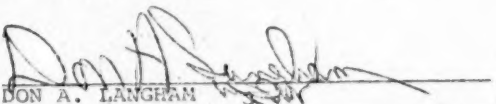

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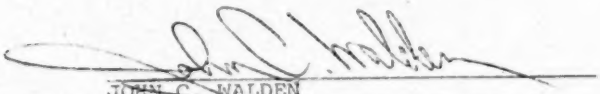

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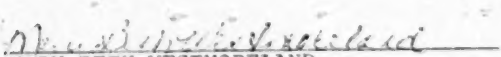

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CERTIFICATE OF SERVICE

I, John C. Walden, counsel of record for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail, with proper address and adequate postage to:

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This 24th day of January, 1980.

JOHN C. WALDEN